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2015

**State of Utah, Plaintiff/Appellee v. Mario L. Guillen, Defendant/  
Appellant**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,  
Plaintiff/Appellee,

v.

MARIO L. GUILLEN,  
Defendant/Appellant.

Case Number: 20150462-CA

---

**BRIEF OF THE APPELLANT**

---

Appeal from a conviction for theft, a class A misdemeanor and false personal information, a class A misdemeanor in the Second District Court, State of Utah, the Honorable W. Brent West, Judge, presiding.

---

Sean D. Reyes (7969)  
**UTAH ATTORNEY GENERAL**  
160 East 300 South, 6th Floor  
PO BOX 140854  
Salt Lake City, Utah 84114-0854

*Attorney for Appellee*

---

Samuel P. Newton (9935)  
**LAW OFFICE OF**  
**SAMUEL P. NEWTON, PC**  
1267 Quarter Horse Lane  
Kalispell, Montana 59901-2514

*Attorney for Appellant*

FILED  
UTAH APPELLATE COURTS

AUG 25 2015

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,  
Plaintiff/Appellee,

v.

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160 East 300 South, 6th Floor  
PO BOX 140854  
Salt Lake City, Utah 84114-0854

*Attorney for Appellee*

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Samuel P. Newton (9935)  
**LAW OFFICE OF**  
**SAMUEL P. NEWTON, PC**  
1267 Quarter Horse Lane  
Kalispell, Montana 59901-2514

*Attorney for Appellant*

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,  
Plaintiff/Appellee,

v.

MARIO L. GUILLEN  
Defendant/Appellant.

Case Number: 20150462-CA

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**NATURE OF THE PROCEEDINGS AND JURISDICTION**

Appeal from a conviction for theft, a class A misdemeanor and false personal information, a class A misdemeanor in the Second District Court, State of Utah, the Honorable, W. Brent West, Judge, presiding.

This court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(e).

**STATEMENT OF THE ISSUES & STANDARD OF REVIEW**

1. Whether the trial court erred in sentencing Mr. Guillen based on his failure to look at the victim during her colloquy.

- a. Standard of Review: “The [district] court has substantial discretion in conducting sentencing hearings and imposing a sentence, and we will in general overturn the [district] court's sentencing decisions only if we find an abuse of discretion.” *State v. Bryant*, 2012 UT App 264, ¶ 9, 290 P.3d 33 (quoting *State v. Patience*, 944 P.2d 381, 389 (Utah Ct. App. 1997)).

- b. Preservation of the Argument: This argument was not preserved and must be reviewed for plain error or ineffective assistance of counsel.

### **CONSTITUTIONAL OR STATUTORY PROVISIONS**

The texts of the relevant Constitutional provisions and statutes are in Addendum A and B.

### **STATEMENT OF THE CASE**

On April 30, 2015, Mr. Guillen entered guilty pleas to two class A misdemeanors on two separate cases. R. 24-31. On June 3, 2015, the court sentenced Mr. Guillen to a term of 365 days in jail on both counts, with the counts to run concurrently. R. 40-43. On June 9, 2015, Mr. Guillen filed a notice of appeal to this court. R. 46-47.

### **STATEMENT OF THE FACTS**

Mr. Guillen admitted his guilt of taking a laptop from a friend and giving a false identification card to the police when he was apprehended. R. 24-29; 65:5. Adult Probation and Parole ("AP&P") recommended a year in jail, noting in part Mr. Guillen's negative parole history and prior prison commitments. R. 32-38.

At sentencing, the parties spoke very briefly. R. 65. The defense asked the court for good time and the State submitted on AP&P's recommendations. R. 65:4. When the victim spoke, she complained that since Mr. Guillen had taken her laptop, she cried herself to sleep and lived in fear until he was caught. R. 65:4.

The State then commented that it found it “interesting that the defendant doesn’t pay attention to the victim during the speech.” R. 65:4. The court responded that his inattention “was not lost on me.” R. 65:5.

Mr. Guillen responded that “[m]y lawyer told me not to look at her,” adding that “I’d like to say actually I’m sorry for what I did and hopefully, she can forgive me and I’ve got to do my time.” R. 65:5.

With that, the court sentenced Mr. Guillen to a year in jail with credit for the time he had served. R. 65:5.

### **SUMMARY OF THE ARGUMENT**

The trial court improperly relied on Mr. Guillen’s inattention to the victim as a basis for its jail sentence. Mr. Guillen apparently relied on the advice of his lawyer to not look at the victim. The trial court plainly erred and defense counsel ineffectively failed to object to the State’s improper comment and to object to the court’s reliance on that irrelevant factor in sentencing.

### **ARGUMENT**

#### **POINT I**

**The trial court abused its discretion in sentencing Mr. Guillen to a term of incarceration based on his failure to look at the victim while she addressed the court**

The trial court appears to have relied on Mr. Guillen’s failure to look at the victim while she spoke as an indication that he lacked remorse, and consequently deserved a term of incarceration. This was an abuse of discretion.



The trial court's sentencing decision is reviewed for an abuse of discretion. *State v. Wright*, 893 P.2d 1113, 1120 (Utah Ct. App. 1995). "An abuse of discretion results when the judge fails to consider all legally relevant factors or if the sentence imposed is clearly excessive." *State v. Valdovinos*, 2003 UT App 432, ¶ 14, 82 P.3d 1167; *see also State v. Rhodes*, 818 P.2d 1048, 1051 (Utah Ct. App. 1991) ("it must be clear that the actions of the judge were so inherently unfair as to constitute abuse of discretion") (citation omitted); *Bluff v. Utah*, 2002 UT 66, ¶ 66, 52 P.3d 1210. Further, the Due Process Clause "require[s] that a sentencing judge act on reasonably reliable and relevant information in exercising discretion in fixing a sentence." *State v. Howell*, 707 P.2d 115, 118 (Utah 1985); *see State v. Johnson*, 856 P.2d 1064, 1071 (Utah 1993). This Court has said that "[a]n abuse of discretion may be manifest if the actions of the judge in sentencing were 'inherently unfair' or the judge imposed a 'clearly excessive' sentence." *State v. Baker*, 963 P.2d 801, 810 (Utah Ct. App. 1998) (internal citations omitted).

"A sentence in a criminal case should be appropriate for the defendant in light of his background and the crime committed and also serve the interests of society which underlie the criminal justice system." *State v. McClendon*, 611 P.2d 728, 729 (Utah 1980). Although sentencing judges have "discretion in determining what punishment fits both the crime and the offender," Utah courts seek "to shore up the soundness and reliability of the factual basis upon which the judge must rely in the exercise of that sentencing discretion." *State v. Lipsky*, 608 P.2d 1241, 1249 (Utah 1980).

Thus, a trial court does not have discretion to violate the defendant's due process "right to be sentenced based on relevant and reliable information regarding his crime, his background, and the interests of society." *State v. Wanosik*, 2001 UT App 241, ¶ 34, 31 P.3d 615, *aff'd*, *State v. Wanosik*, 2003 UT 46, ¶ 19, 79 P.3d 937 ("one purpose of the right to allocate ... is to ensure that the judge is provided with reasonably reliable and relevant information regarding sentencing"); *see State v. Sweat*, 722 P.2d 746, 746 (Utah 1986) ("so long as basic constitutional safeguards of due process and procedural fairness are afforded, the trial court has broad discretion in considering 'any and all information that reasonably may bear on the proper sentence'" (citation omitted)); *State v. Lipsky*, 608 P.2d 1241, 1248 (Utah 1980) ("fundamental fairness" requires that sentence be based only upon "accurate information"); *State v. Sibert*, 310 P.2d 388, 393 (Utah 1957) (court abuses its discretion if it bases sentence upon "wholly irrelevant, improper or inconsequential consideration").

The trial court indicated that Mr. Guillen's failure to look at the victim was "not lost on me" when the State noted his apparent disinterest. R. 65:4-5. Even though Mr. Guillen was apparently admonished by his lawyer to not look at the victim, the court appears to have relied on this as a basis for incarcerating Mr. Guillen. This was "inherently unfair" because it punished Mr. Guillen not for the crime or his background, but on the irrelevant and unreliable fact that he followed his lawyer's advice to not look at the victim. Granted, Mr. Guillen had a negative parole history and prior prison commitments, but the court never addressed those

facts and instead, focused its only comment on Mr. Guillen's failure to look at the victim. Thus, the sentence amounted to an abuse of discretion.

#### **A. THE TRIAL COURT PLAINLY ERRED**

Mr. Guillen did not object, so this court must review the error under the plain error and ineffective assistance of counsel doctrines. This court may review an unpreserved issue for plain error. To demonstrate plain error, a party must show that "[1] an error exists; [2] the error should have been obvious to the trial court; and [3] the error is harmful." *State v. Powell*, 2007 UT 9, ¶ 18, 154 P.3d 788 (internal quotation and correction omitted).

The error exists in this case for the reasons demonstrated *supra*. The court had an obligation to sentence a defendant based on reliable and relevant information, and in this case, it based its sentence on an unreliable and irrelevant fact. *See Wanosik*, 2001 UT App 241, ¶ 34

The error should have been obvious. "An error is obvious when the law governing the error was clear at the time the alleged error was made." *State v. Low*, 2008 UT 58, ¶ 41, 192 P.3d 867 (internal citation and quotation omitted). The law clearly mandated that the court base its sentence on reliable information and that it not be based on inaccurate information. *Lipsky*, 608 P.2d at 1248. Thus, the error was obvious.

As to the third prong, "[a]n error is harmful if it is of such a magnitude that there is a reasonable likelihood of a more favorable outcome for the defendant."

*Id.* at ¶ 43 (internal quotation and citation omitted). Clearly, there was a much higher likelihood that Mr. Guillen would have received a more treatment-oriented sentence had the court based its sentence on the available information. For example, Mr. Guillen had a history of drug abuse and multiple absconsions from treatment settings. R. 37-38. The court well could have elected to give Mr. Guillen more of a lockdown treatment sentence, so that his long-term problems could have been addressed.

**B. DEFENSE COUNSEL INEFFECTIVELY FAILED TO OBJECT TO  
THE IMPROPER FACT**

Defense counsel also failed to object to the improper fact that Mr. Guillen did not look at the victim or even to advocate for a reasonable sentence. The Sixth Amendment provides a criminal defendant with the right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To establish a claim of ineffective assistance, the defendant must show that (1) his attorney's acts or omissions "fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Powell*, 2007 UT 9, ¶ 45, 154 P.3d 788 (footnotes omitted); *see also State v. Holland*, 876 P.2d 357, 359 (Utah 1994) (stating "defendants are wholly dependent on the dedication of their attorneys to protect their interests and to ensure their fair treatment under the law").

This court "give[s] trial counsel wide latitude in making tactical decisions and will not question such decisions unless there is no reasonable basis supporting

them.” *State v. Crosby*, 927 P.2d 638, 644 (Utah 1996). Thus, to succeed on a claim of ineffective assistance of counsel, Defendant must “rebut the strong presumption that under the circumstances, the challenged action might be considered sound trial strategy.” *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92 (quotations and citations omitted).

To demonstrate ineffective assistance of counsel, the defendant must show that his counsel’s “performance both falls below an objective standard of reasonableness and prejudices his client.” *Adams v. State*, 2005 UT 62, ¶ 25, 123 P.3d 400 (citing *Strickland*, 466 U.S. at 687).

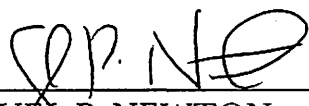
The case of *State v. Ott* is particularly instructive. In that case, defense counsel failed to object to victim impact testimony which was presented at his sentencing hearing. The testimony surrounded the victims’ feelings if Ott were to be released and their opinions as to his ability to be rehabilitated. *State v. Ott*, 2010 UT 1, ¶¶ 26-32, 247 P.3d 344. The Supreme Court found these statements to be highly prejudicial and inadmissible in a sentencing hearing. *Id.* at ¶ 33. Counsel’s failure to object to the admission of these statements constituted ineffective assistance of counsel, partially because the United States Supreme Court had specifically prohibited this kind of testimony. “[I]f the evidence ha[s] no conceivable beneficial value to [the defendant], the failure to object to it cannot be excused as trial strategy.” *Id.* at ¶ 38, citing *State v. Hovater*, 914 P.2d 37, 42 (Utah 1996).

Similarly, counsel's failure to object to the improper implication that his client's failure to look at the victim had some sort of negative impact and to advocate for a reasonable sentence had no conceivable beneficial value to Mr. Guillen and amounted to ineffective assistance for the reasons stated *supra*. Mr. Guillen was harmed because the court was left to sentence him based on an irrelevant and improper reason and there was a good likelihood that he would have received a less harsh sentence otherwise.

### **CONCLUSION**

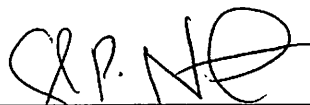
For these reasons, this court should find that the trial court abused its discretion in finding that Mr. Guillen's failure to look at the victim was grounds for a jail sentence.

RESPECTFULLY SUBMITTED this 18 day of August, 2015.

  
\_\_\_\_\_  
SAMUEL P. NEWTON  
Attorney for the Defendant/Appellant

### **RULE 24 CERTIFICATE OF COMPLIANCE**

Pursuant to rule 24(f)(1)(C), Utah Rules of Appellate Procedure, I certify that this brief has been prepared in a proportionally-spaced font using Microsoft Word for Mac in Baskerville 13 point, and contains 2006 words, excluding the table of contents, table of authorities, and addenda.



---

SAMUEL P. NEWTON  
Attorney for the Defendant/Appellant

## CERTIFICATE OF SERVICE

I hereby certify that on this 20<sup>th</sup> day of August, I have caused to be

☐ mailed ☒ hand-delivered eight copies of the foregoing to:

Utah Court of Appeals  
450 South State  
P.O. Box 140230  
Salt Lake City UT 84114-0230

I certify that on this 20<sup>th</sup> day of August, two copies of the foregoing

brief were ☐ mailed ☒ hand-delivered to:

Utah Attorney General  
160 East 300 South, 6th Floor  
PO BOX 140854  
Salt Lake City, Utah 84114-0854

A digital copy of the brief was also included: ☒ Yes ☐ No

A handwritten signature in cursive script, appearing to read "L. J. Ba", is written over a horizontal line.



Tab A

## **ADDENDUM A**

### **Constitutional Provisions**

#### **UNITED STATES CONSTITUTION**

##### **FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

##### **SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

##### **FOURTEENTH AMENDMENT, SECTION 1**

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## **UTAH CONSTITUTION**

### **ARTICLE I, SECTION 7. [DUE PROCESS OF LAW.]**

No person shall be deprived of life, liberty or property, without due process of law.

### **ARTICLE I, SECTION 12. [RIGHTS OF ACCUSED PERSONS.]**

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases.

Tab B

**ADDENDUM B**

**Sentencing Transcript**

IN THE SECOND JUDICIAL DISTRICT COURT, OGDEN  
WEBER COUNTY, STATE OF UTAH

-o0o-

STATE OF UTAH,	)	
	)	
Plaintiff,	)	Case No. 141901625
vs.	)	Case No. 151900895
	)	
MARIO LOUIS GUILLEN,	)	<u>SENTENCING</u>
	)	
Defendant.	)	

-o0o-

BE IT REMEMBERED that on the 3<sup>rd</sup> day of June, 2015,  
commencing at the hour of 9:23 a.m., the above-entitled matter  
came on for hearing before the HONORABLE W. BRENT WEST,  
sitting as Judge in the above-named Court for the purpose of  
this cause and that the following proceedings were had.

-o0o-

A P P E A R A N C E S

For the State:

CHRISTOPHER L. SHAW  
Deputy Weber County Attorney  
2380 Washington Boulevard  
Suite 230  
Ogden, Utah 84401

For the Defendant:

RANDALL L. MARSHALL  
Attorney at Law  
2650 Washington Boulevard  
Suite 202  
Ogden, Utah 84401

\* \* \*

P R O C E E D I N G S

(Transcriber's Note: Speaker identification  
may not be accurate with audio recordings.)

MR. SHAW: Nos. 8, 9 and 10, Mario Guillen.

THE CLERK: State of Utah vs. Mario Louis Guillen,  
Case Nos. 141901625 and 151900895. Time set for sentencing.  
And 151900904, it's been set for disposition and extradition.

THE COURT: Any reason why sentence should not be  
imposed?

MR. MARSHALL: No, your Honor.

THE COURT: Would you and Mr. Guillen like to  
address it? My understanding is Colorado wants him.

MR. MARSHALL: That's my understanding as well, so I  
guess the first step is to get him resolved here, we certainly  
would ask for credit, which they've already talked about and I  
assume this Court generally is good about good time, so we  
would ask for that.

THE COURT: Okay. The State want to be heard?

MR. SHAW: State will submit it on the  
recommendations.

THE COURT: Anything else from Adult Probation &  
Parole?

UNIDENTIFIED SPEAKER: No, your Honor.



1                   THE COURT: Is he in any kind of posture to pay the  
2                   restitution?

3                   MR. SHAW: Your Honor, I do have a victim here that  
4                   would like to speak.

5                   THE COURT: All right.

6                   MR. SHAW: I'd forgot about that.

7                   THE COURT: Who am I going to hear from?

8                   MR. SHAW: That's a good question.

9                   THE COURT: A. Boyd?

10                  MS. BOYD: Yes.

11                  THE COURT: Okay.

12                  MS. BOYD: My name is Ashley Boyd. I'm Mario's  
13                  victim. After Mario took my stuff, I couldn't sleep, every  
14                  time I tried, I'd wake up crying and screaming with fear from  
15                  nightmare that he'd come back and hurt me. My CDs and movies  
16                  were all I had. I was content staying home and watching  
17                  movies and listening to music. Every year since I was a  
18                  child, my parents would buy me movies and CDs, I'd stay up on  
19                  my laptop. I can't do that because of Mario.

20                  I cry myself to sleep, begging for an answer, why  
21                  me? Why my stuff? I can't watch movies with my niece and  
22                  nephew, because Mario took that from us.

23                  I lived in fear up until Mario got caught.

24                  THE COURT: Thank you. Anything else you'd like to  
25                  tell me?

1 MS. BOYD: No.

2 THE COURT: Okay. Thank you.

3 Anything else?

4 MR. SHAW: Well, I find it interesting that the

5 defendant doesn't pay attention to the victim during the

6 speech.

7 THE COURT: Her colloquy, I understand. I--that was

8 not lost on me.

9 MR. GUILLEN: My lawyer told me not to look at her,

10 so...

11 THE COURT: Pardon?

12 MR. GUILLEN: My lawyer told me not to look at her.

13 THE COURT: Oh. Okay. All right.

14 Anything else anybody wants to say?

15 MR. GUILLEN: I'd like to say actually I'm sorry for

16 what I did and hopefully, she can forgive me and I've got to

17 do my time.

18 THE COURT: Okay. Well, they've recommended maximum

19 sentences, Mr. Guillen, and I think the recommendation is

20 correct.

21 It's going to be the order and sentence of the Court

22 that you're to serve a year in the Weber County jail on each

23 of the two Class A misdemeanors. I'll run them concurrent,

24 I'll give you credit for time served, which I show to be 75

25 days.

1 I'm imposing a restitution order of \$5,691.98. Ms.  
2 Boyd is the victim, we'll reduce that down to a civil  
3 judgment.

4 MR. MARSHALL: Your Honor?

5 THE COURT: Yes.

6 MR. MARSHALL: Actually, Mr. Guillen wants to--does  
7 not agree with the restitution.

8 THE COURT: So he wants a hearing on the restitution  
9 figure?

10 MR. MARSHALL: Yes. I apologize.

11 THE COURT: State want to be heard?

12 MR. SHAW: I guess he's entitled to a hearing. We  
13 can--we can set that out--

14 THE COURT: Thirty days?

15 MR. SHAW: Yeah. That's fine.

16 THE COURT: All right. Well set the hearing for  
17 July 1.

18 MR. MARSHALL: I won't be here then, your Honor.

19 THE COURT: When will you be here?

20 MR. MARSHALL: The following week I'm here.

21 THE COURT: July 8<sup>th</sup>. All right. We'll set it for  
22 July 8<sup>th</sup> at 11:00 o'clock.

23 Now, has he signed the extradition papers or is he  
24 indicating that they want--he wants a governor's warrant?

25 MR. MARSHALL: He's not signing the--

1 THE COURT: All right. Then we'll notify Colorado  
2 to prepare the governor's warrant.

3 All right. So he's doing a year, which is the  
4 maximum sentence. He's got credit for time served. We'll  
5 have a restitution hearing on July 8<sup>th</sup> and Colorado will be  
6 notified to do the governor's warrant to come get him 'cause  
7 he's not waiving.

8 THE CLERK: (Inaudible)

9 THE COURT: They show 75 days, yes. Okay.

10 (Whereupon, this hearing was concluded.)

11 \* \* \*

TRANSCRIBER'S CERTIFICATE

STATE OF UTAH :  
COUNTY OF SALT LAKE : ss.  
:

I, Toni Frye, do hereby certify:

That I am a Certified Court Transcriber of Tape Recorded Court Proceedings; that I received the electronically recorded files of the within matter and have transcribed the same into typewriting, and the foregoing pages, to the best of my ability, constitute a full, true and correct transcription, except where it is indicated the Electronically Recorded Court Proceedings were inaudible.

Dated this 16th day of June, 2015.

Toni Frye  
Toni Frye, Transcriber

I, RENEE L. STACY, Registered Professional Reporter, Certified Realtime Reporter and Notary Public for the State of Utah, do hereby certify that the foregoing transcript, prepared by Toni Frye, was transcribed under my supervision and direction.

Renee L. Stacy  
Renee L. Stacy, RPR, CRR

My Commission Expires:

11-9-2015

